United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

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PLS

74-2656

IN THE

United States Court of Appeals

For the Second Circuit

No. 74-2656

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

SALVATORE POLISI,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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SALVATORE POLISI,

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BRIEF FOR APPELLANT SALVATORE POLISI

Preliminary Statement

The Appellant, SALVATORE POLISI, appeals from a Judgment of Conviction in the United States District Court for the Eastern District of New York (Neaher, J.) adjudging him guilty of violating the federal bankrobbery statute, Title 18, United States Code, Section 2113. As a result of this conviction,

the Appellant was sentenced to the custody of the Attorney General, or his duly authorized representative, for a period of eight (8) years pursuant to Title 18, United States Code, Section 4208(a)(2).

The Indictment appears on page 10 of the Appellant's Appendix.

STATEMENT OF THE FACTS

The Appellant, SALVATORE POLISI, was indicted, along with one Edward Pravato, on charges of bankrobbery and conspiracy to commit bankrobbery.[1, 2] The Indictment alleged that on May 3rd, 1971, both defendants robbed a branch office of the Franklin National Bank at 249-46 Horace Harding Boulevard, Queens, New York, of approximately $25,000.00. The facts pertaining to the robbery are not relevant to the issue raised on appeal.

1/ Pravato's conviction was affirmed in UNITED STATES v. PRAVATO, 505 F.2d 703 (2nd Cir., 1974).

2/ The conspiracy count, count three, was dismissed prior to trial. (T 268).

On March 22nd, 1974, the jury selected to hear this case returned a verdict of guilty as to POLISI and his co-defendant on both counts of the Indictment. (T 627)[3] Following the preparation of a pre-sentence report (T 630), on May 31st, 1974 the Appellant, POLISI, was committed pursuant to the provisions of Title 18, United States Code, Section 4208(b) for study and report. There was no appeal taken on behalf of POLISI at that time.[4]

Finally, after the District Court granted an extension to the Bureau of Prisons of the statutory three-month period, the Appellant appeared for re-sentence on December 13th, 1974. Prior to sentence, on the basis of the report furnished pursuant to the 4208(b) study and the pre-sentence report, counsel moved to set aside the verdict and for a new trial on the ground that there was a "reasonable basis" to believe that the Appellant was mentally incompetent at all or various stages

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3/ The letter "T" refers to the trial transcript while the letter "A" refers to the Appellant's Appendix.

4/ See, COREY v. UNITED STATES, 375 U.S. 169 (1963) where the Supreme Court held that a convicted defendant committed pursuant to this section may appeal after either the first or second sentence at his option.

of the prosecution and perhaps during the alleged robbery.[5] Alternatively, counsel requested that an evidentiary hearing be held wherein a determination of the Appellant's mental competence could be made. (A 21) This application, also, was based upon the 4208(b) report which made reference to the Appellant's schizophrenic personality. (A 21)[6] Relying on the pre-sentence report and the 4208(b) study, the Trial Court denied Appellant's Motions and imposed sentence. (A 21 - 22, 24)

STATUTES INVOLVED

Title 18, United States Code, Section 4208(b) provides as follows:

> "(b) If the court desires more detailed information as a basis for determining the sentence to be imposed, the court may commit the defendant to the custody of the Attorney General, which commitment shall be deemed to be for the maximum sentence of imprisonment prescribed by law, for a study as described

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5/ Insanity was not raised as a defense at trial.

6/ Both the pre-sentence report and the probation report were, at the request of counsel, marked as court exhibits and sealed for review by this Court. (A 20 - 21)

in subsection (c) hereof. The results of such study, together with any recommendations which the Director of the Bureau of Prisons believes would be helpful in determining the disposition of the case, shall be furnished to the court within three months unless the court grants time, not to exceed an additional three months, for further study. After receiving such reports and recommendations, the court may in its discretion: (1) Place the prisoner on probation as authorized by section 3651 of this title, or (2) affirm the sentence of imprisonment originally imposed, or reduce the sentence of imprisonment, and commit the offender under any applicable provision of law. The term of the sentence shall run from the date of original commitment under this section."

Title 18, United States Code, Section 4208(c) provides as follows:

"(c) Upon commitment of a prisoner sentenced to imprisonment under the provisions of subsection (a), the Director, under such regulations as the Attorney General may prescribe, shall cause a complete study to be made of the prisoner and shall furnish to the board of parole a summary report together with any recommendations which in his opinion would be helpful in determining the suitability of the prisoner for parole. This report may include but shall not be limited to data regarding the prisoner's previous delinquency or criminal experience, pertinent circumstances of his social background, his capabilities, his mental and physical health, and such other factors as may be considered pertinent. The board of parole may make such other investigation

as it may deem necessary.

It shall be the duty of the various probation officers and government bureaus and agencies to furnish the board of parole information concerning the prisoner, and, whenever not incompatible with the public interest, their views and recommendations with respect to the parole disposition of his case."

Title 18, United States Code, Section 4244 provides as follows:

"Whenever after arrest and prior to the imposition of sentence or prior to the expiration of any period of probation the United States Attorney has reasonable cause to believe that a person charged with an offense against the United States may be presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense, he shall file a motion for judicial determination of such mental competency of the accused, setting forth the ground for such belief with the trial court in which proceedings are pending. Upon such a motion or upon a similar motion in behalf of the accused, or upon its own motion, the court shall cause the accused, whether or not previously admitted to bail, to be examined as to his mental condition by at least one qualified psychiatrist, who shall report to the court. For the purpose of the examination the court may order the accused committed for such reasonable period as the court may determine to a suitable hospital or other facility to be designated by the court. If the report of the psychiatrist indicates a

> state of insanity or such mental incompetency in the accused, the court shall hold a hearing, upon due notice, at which evidence as to the mental condition of the accused may be submitted, including that of the reporting psychiatrist, and make a finding with respect thereto. No statement made by the accused in the course of any examination into his sanity or mental competency provided for by this section, whether the examination shall be with or without the consent of the accused, shall be admitted in evidence against the accused on the issue of guilt in any criminal proceeding. A finding by the judge that the accused is mentally competent to stand trial shall in no way prejudice the accused in a plea of insanity as a defense to the crime charged; such finding shall not be introduced in evidence on that issue nor otherwise be brought to the notice of the jury. Added Sept. 7, 1959, c.535, §1, 63 Stat.686."

QUESTION PRESENTED

Whether the Trial Court erred in sentencing Appellant rather than committing him pursuant to the provisions of Title 18, United States Code, Section 4244, or holding an evidentiary hearing on the issue of mental competence?

POINT

THE TRIAL COURT ERRED IN DENYING APPELLANT'S MOTIONS WITHOUT EITHER AN EVIDENTIARY HEARING OR EXAMINATION PURSUANT TO TITLE 18, UNITED STATES CODE, SECTION 4244.

This appeal presents but a single issue. Should the sentence herein be vacated because of the Trial Court's summary rejection of any attempt to explore Appellant's pre-sentence claim of mental incompetence where a Government study and report provided a factual basis for that claim? Appellant herein contends on appeal that the Trial Court was obligated to hold an evidentiary hearing on this Motion or, at the very least, to have committed the Appellant pursuant to Title 18, United States Code, Section 4244. For this reason alone, it is submitted that the prison sentence should be vacated and the case be remanded to the District Court.

In treating this issue, two fundamental principles should be noted. First, mental incompetence is a question of constitutional dimension. Second, the failure to raise the issue of mental incompetence at the trial itself cannot be construed as a "waiver," since

> "It is contradictory to argue that the defendant may be incompetent and

> yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial."[7]

PATE v. ROBINSON, 383 U.S. 375, 384 (1966); NATHANIEL v. ESTELLE, 493 F.2d 794 (5th Cir., 1974). See, also, TILLERY v. EYMAN, 492 F.2d 1056 (9th Cir., 1974), where it was stated that:

> "It is elementary that the conviction of an accused while he is incompetent violates his due process rights. Citing Pate v. Robinson, supra. and Bishop v. United States, 350 U.S. 961 (1956)."

Equally clear from this line of cases is the principle that an evidentiary hearing is required whenever there is substantial evidence that a defendant may be mentally incompetent. PATE v. ROBINSON (SUPRA); TILLERY v. EYMAN (SUPRA).

This Court in UNITED STATES v. MIRANDA, 437 F.2d 1255 (2nd Cir., 1971) held that where there is a factually supported allegation of mental incompetence, an evidentiary hearing is required. This holding was with regard to a 2255 application.[8]

7/ "Waiver" can hardly be argued here as the issue was raised prior to sentence. See, TITLE 18, UNITED STATES CODE, SECTION 4244.

8/ Title 28, United States Code, Section 2255.

It is axiomatic, however, that similar relief should be afforded where the issue is raised in a more timely fashion prior to the imposition of sentence. It is fundamental that even with regard to 2255 Motions, where allegations of error must reach a higher threshold, evidentiary hearings are denied only where the petitions contain baseless and conclusory assertions of fact. UNITED STATES v. MIRANDA (SUPRA); O'NEIL v. UNITED STATES, 486 F.2d 1034 (2nd Cir., 1973). Indeed, the O'NEIL decision, in its conclusion that an "evidentiary hearing may be appropriate after a revised motion is prepared," reflects a high degree of sensitivity towards prisoners' claims of mental incompetence.

It may be anticipated that the Government will argue in this case that Appellant's request for an evidentiary hearing on the eve of sentence is founded upon frivolity. ZOVLUCK v. UNITED STATES, 448 F.2d 339 (2nd Cir., 1971).[9] The record below, however, conclusively forecloses any such argument.

The ZOVLUCK case, while distinguishable, presents an interesting contrast to the case at bar. In ZOVLUCK, Judge

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9/ In ZOVLUCK, this Court noted that "the trial court very wisely held an evidentiary hearing." 448 F.2d at p.341.

Oakes first noted the possible inference that direct appeal had been "deliberately bypassed" because a psychiatric report had been furnished while petitioner's initial appeal had been pending. In the instant case, the basis of the Appellant's Motion was the 4208(b) report, furnished minutes prior to the time that the Motion was made on December 13th, 1974. Moreover, unlike ZOVLUCK, this is not a case where there is a "sham" evident behind Appellant's claim. Due to the unusual nature of both the pre-sentence and the 4208(b) reports, the factual basis of Appellant's claim is not contained in Appellant's Appendix filed in this Court; RULE 30, FEDERAL RULES OF APPELLATE PROCEDURE. However, pursuant to the directive of the District Court, the reports may be unsealed by appropriate order. (A 21) Review of these reports, it is submitted, would clearly indicate that there is a non-frivolous factual basis for Appellant's request that an evidentiary hearing be held.

Nevertheless, the Trial Court denied both Appellant's Motions and the request that an evidentiary hearing be held. In so doing, the Court articulated its reliance on the pre-sentence report and the 4208(b) study. Due to the fact that

an application for an adjournment was denied (A 18), the Appellant's oral Motion and the Court's ruling appear in the following manner:

"MR. SHARGEL: May it please the Court, at this time I would respectfully move pursuant to Rule 29 and Rule 33 of the Federal Rules of Criminal Procedure for either a new trial or an order setting aside the verdict of the jury on the grounds that there is a reasonable basis to believe, based upon the pre-sentence study and the report, that this individual, Salvatore Polisi, was incompetent to stand trial, perhaps incompetent at the time that the offense was allegedly committed, and further that he is incompetent to be sentenced by Your Honor this morning.

I do this and note for the record, I do this based upon the report furnished pursuant to 4208(b). I would note further, Your Honor, a request that an evidentiary hearing be held wherein evidence could be presented before the court and evidence could be presented by the government to determine whether Mr. Polisi is so competent.

THE COURT: Well, I'm going to deny the motions at this time and believing on the basis of the probation report, and on the basis of the classification report, as I have read them, that the defendant who has an I.Q. of 114 indicating above-average

intelligence has certain emotional problems which have been a cause of some distress.

I see nothing in these reports suggesting to the court a basis for holding an evidentiary hearing on the state of his mentality, even at the time of the crime in question, I believe occurred in accordance with the indictment of May of 1971, or indicating his inability to stand trial which took place in March, I believe it was 1974, so I will deny those motions.

MR. SHARGEL: Note my objection most respectfully, Your Honor." (A 21 - 22)

It is here submitted that the District Court erred by denying the Motion on the basis of these reports. In support of this argument, Appellant relies on the Circuit Court of Appeals' decision in VAN DE BOGART v. UNITED STATES, 305 F.2d 583 (5th Cir., 1962). In VAN DE BOGART, the Court was presented, on a 2255 application, with a factual situation almost identical to that at bar. After a plea of guilty, the Appellant in VAN DE BOGART was committed, as was the Appellant here, to the custody of the Attorney General under the provisions of 4208(b). That report, which Appellant herein believes is similar to his report, indicated "schizophrenic illness." As

in the instant case, the Trial Court in VAN DE BOGART

> "...did not think that [the report] revealed any such mental incompetence as to (1) vitiate petitioner's earlier plea of guilty or (2) require a further hearing to determine the facts."

And, as here, the judge preceeded to sentence the defendant.

The Court of Appeals, in remanding the matter, stated that Section 4208 is "wholly unsuited to a determination of mental competency to stand trial." The singular purpose of Section 4208(b) is to aid the Court in determining what sentence is appropriate. The issue for the VAN DE BOGART Court, therefore, was whether it was "error in that original criminal trial not to do something further." Then, considering whether relief was available on a 2255 Motion, the Court noted that:

> "Of course, that distinction may be vital since it is quite conceivable that on a direct appeal from the conviction, a lesser showing of doubtful mental competency would suffice than in a collateral attack."

The real distinction between VAN DE BOGART and the case at bar is that the question of mental competence is here presented on direct appeal. The VAN DE BOGART Court stated that denial of a hearing "inevitably presents the problem of interpreting, analyzing and drawing inferences from a medical,

psychiatric report." 305 F.2d at p.588. The same is true in the case at bar. It was clearly not the purpose of the 4208(b) report to determine Appellant's competency at any stage of these proceedings. Based upon the medical and psychiatric information supplied, however, the Trial Court made a determination that the facts there contained did not warrant a hearing. Disposition of the Motion in this manner was rejected by the Court in VAN DE BOGART. That Court concluded that:

> "The judge may not reach the portentious conclusion of mental competency solely on the basis of such ex parte medical-psychiatric or institutional report. A further judicial hearing must be held, the exact nature of which we need not here blueprint."

The Court then stated:

> "What we hold is that with the information then and now disclosed in the Prison Report, the judge ought not to have gone on with the case until mental competency to stand trial was judicially determined. Doing so in the 2255 proceeding, the judge will simultaneously determine what he should have found earlier." 10

10/ See, UNITED STATES v. COLLIER, 339 F.2d 705 (7th Cir., 1968).

It is clear, therefore, that the District Court erred in relying upon the 4208(b) report in denying Appellant's Motion. A plain reading of Section 4208(b) indicates clearly that the purpose of the study does not relate to mental competency. See, also, OLIVER v. UNITED STATES, 398 F.2d 353 (9th Cir., 1968). In view of the statutory scheme, this pre-sentence application could well have been disposed of pursuant to the provisions of Title 18, United States Code, Section 4244. In view of the authority cited, it would now seem appropriate to remand this matter to the District Court for an evidentiary hearing to determine the Appellant's mental competency.

CONCLUSION

For the foregoing reasons, it is respectfully requested that Appellant's sentence be vacated and that the matter be remanded to the District Court for an evidentiary hearing on the issue of Appellant's mental competency.

Respectfully submitted,

LA ROSSA, SHARGEL & FISCHETTI
Attorneys for Defendant-Appellant
SALVATORE POLISI

GERALD L. SHARGEL
Of Counsel

Service of ~~three (3)~~ Two (2) copies of the within
Brief is hereby admitted
this day of

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Attorney(s) for